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No. 93-659

IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents' opposition ("Opp.") to the petition for certiorari ("Pet.") demonstrates why the decision of the Ninth Circuit in this case merits review by this Court. Respondents do not dispute that the Circuits are split on the question presented—whether agents of the employer can be held personally liable for their discriminatory acts under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"). Opp. 23; *see* Pet. 15-22. Nor do respondents dispute that the question presented is an important question of Federal law. *See* Pet. 23-25.

As the Equal Employment Opportunity Commission ("EEOC") argued below, the Ninth Circuit panel "issued a sweeping and unprecedented decision removing an entire class of defendants from coverage under Title VII and the ADEA". Brief of the Equal Employment Opportunity Commission as

Amicus Curiae in Support of the Petition for Rehearing with Suggestion for Rehearing En Banc, at i, *Miller v. Maxwell's International*, No. 90-16286 (9th Cir. June 4, 1993).

Instead, respondents engage in a personal attack on petitioner and rely on a purported jurisdictional defect in the court below as support for their argument that this Court should grant the petition and vacate the judgment below. The court's decision that it possessed jurisdiction, however, was entirely correct. It does not provide grounds for the Court to deny the petition or to summarily vacate the judgment on jurisdictional grounds but, if anything, provides yet another reason why this Court should grant certiorari.[1]

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[1] Instead of responding to the legal questions presented in the petition, respondents devote their brief to a personal attack on petitioner. The attack is both false and irrelevant to the question whether this Court should grant review. Respondents criticize petitioner for being a "ring-wise, litigation savvy petitioner" (Opp. 22) and "a crafty litigant" (Opp. 23) and at the same time for filing papers that were "virtually incomprehensible". Opp. 5. The truth is that petitioner has merely sought to enforce her rights, and was proceeding entirely without the assistance of counsel until her petition in this Court. Although respondents criticize petitioner for filing complaints with the EEOC and for appealing to the Ninth Circuit and seeking review in this Court (Opp. 12-13, 22), the complaints with the EEOC were a prerequisite to her action under Title VII (42 U.S.C. § 2000e-5(e)(1) (1988)) which she had every right to appeal. Moreover, while respondents seek to attach some significance to the EEOC's letter and respondents' own memos, petitioner alleges that the letters were pretextual and it is well established that the fact that the EEOC issues a right to sue letter rather than pursuing the action itself does not impugn the merits of the underlying action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973).

Respondents' brief contains numerous other inaccuracies. We respond to only some of them here. Petitioner is not a former waitress but was employed initially as a hostess and promised a promotion by respondents. (App. E-8, ¶¶ 35-36) The restaurant did not close in 1987. Opp. 5. Petitioner submitted her EEOC records to the court and respondents, as the district court docket reflects. Opp. 11. Finally, the arbitral award authorized by the bankruptcy court and paid to Miller does not constitute compensation for the unlawful acts forming the basis of this action. Petitioner seeks substantial relief and suffered substantial injury (App. E-12, ¶ 67), but did not have the opportunity to prove her entitlement to that relief because of the holding of the court below that agents of the employer could not be held liable under Title VII or ADEA.

I. THE PERSONAL LIABILITY OF AN AGENT OF AN EMPLOYER UNDER TITLE VII AND THE ADEA IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE CIRCUIT COURTS ARE SPLIT.

As we argued in the petition and the EEOC argued below, the Ninth Circuit's decision undermines the deterrent and compensatory objectives of both Title VII and the ADEA statutes, removes an entire class of defendants from coverage under those statutes, and would preclude victims of discrimination from obtaining any relief in many cases—including cases of sexual harassment in which the corporate employer cannot itself be held liable. Pet. 23-25. The Circuit courts have split on the question presented, with five Circuits holding that agents of the employer can be held liable under Title VII or the ADEA. Opp. 23; Pet. 15-22. [2]

Respondents do not dispute that the question presented is an important question of Federal law or that the Circuit courts are in conflict. Rather, they argue on the merits that the Ninth Circuit was correct—and the other Circuits presumably incorrect—in its interpretation of Title VII and the ADEA. That argument, however, even if it were correct, does not provide grounds for denying the petition for certiorari. Five Circuits have held otherwise and the question is ripe for this Court's review. Unless this Court grants the petition, the protection accorded employees within the largest Federal Circuit will be markedly less than that accorded employees in the rest of the country.

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[2] Two more district courts have followed the Ninth Circuit's holding in *Miller* since approximately the date of the petition. *See Henry v. E.G.&G. Missouri Metals Shaping Co.*, No. 93-1206, slip op., 1993 WL 479747, at *2 (E.D. Mo. Nov. 19, 1993) (noting that the "federal courts are divided on the issue of personal liability, especially with regard to supervisors, under Title VII" and refusing to hold supervisor individually liable); *Bramesco v. Drug Computer Consultants*, 834 F. Supp. 120, 123 (S.D.N.Y. 1993) ("Title VII and the ADEA are directed toward employers, not individual natural persons who are not themselves employers, at least absent separate intentional misconduct"; citing *Miller*).

In any event, respondents are not correct in their interpretation of Title VII and the ADEA. Respondents argue, in essence, that because the substantive provisions of Title VII and the ADEA subject only the "employer" to liability, Congress did not intend agents of the employer to be held liable. Opp. 19-20. In Title VII and the ADEA, however, Congress explicitly defined the term "employer" as used in the substantive provisions to include "any agent" of the employer. Section 701(b) of Title VII, 42 U.S.C. § 2000e-1 (1988); Section 11 of ADEA, 29 U.S.C. § 630(b) (1988). Moreover, as we have noted (Pet. 21-22), this Court has held that Congress intended the term "employer" in a closely related context to include any person with "substantial control of the terms and conditions of the work" of employees. *Falk v. Brennan*, 414 U.S. 190, 195 (1973). Thus it is clear that the employer who is prohibited from engaging in employment discrimination under Title VII and the ADEA includes "any agent" of the employer. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). That Congress could have written the statutes differently provides no justification for ignoring the plain and natural meaning of Congress' words as it wrote them.[3]

Moreover, if Congress had written the statute as respondents suggest, it could not have achieved the objective it plainly intended to achieve in Title VII or the ADEA. Respondents suggest that if Congress had intended agents of the employer to be held liable, it would have written Title VII and the ADEA to say "no person shall discriminate in the workplace". Opp. 19-20. That language, however, would have subjected to liability not only supervisory employees such as respondents but also co-workers and other persons not agents of the employer whom Congress did not intend to hold liable under Title VII and the

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[3] Respondents' argument asks the Court to ignore the definition of "employer", a definition Congress intended to incorporate in the substantive provisions of Title VII and the ADEA. If that definition were not applicable to the substantive provisions, "employers" not engaged in "an industry affecting commerce" and employers with fewer than 15 employees would be subject to Title VII and the ADEA, a result that Congress plainly did not intend.

ADEA. Thus, the fact that Congress did not write Title VII and the ADEA to make "any person" liable for discrimination does not provide a reason for denying the writ.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT IT POSSESSED JURISDICTION.

Respondents' principal argument is not that the question presented by petitioner is not worthy of review by this Court but rather that the Ninth Circuit erred in holding that it possessed jurisdiction.[4] Respondents argue that even though petitioner relied on assurances by the district court that her Rule 59(e) motion was timely, the time for filing her appeal was not tolled because petitioner did not receive "'specific assurance' by a judicial officer that an appeal ha[d] been perfected". Opp. 16.[5] Thus, respondents argue that this Court should grant the petition and vacate the judgment below for lack of jurisdiction. Opp. 18. Thus, as respondents concede, the jurisdictional question they pose at most provides an additional reason to grant the petition for certiorari.

However, the Ninth Circuit's decision that it possessed jurisdiction was correct. This Court has held that the time for filing a notice of appeal may be tolled where a party has performed an act which if properly done would postpone the deadline for filing an appeal and has received specific assurance from a judicial officer that the act has been properly done. *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962); *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 387 (1964); *Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). In *Thompson*, for example, the Court held that the time for appellant to file his notice of appeal was tolled by the district court's statement that appellant's post-trial motions were

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[4] Respondents concede that this Court has jurisdiction. Opp. 1.

[5] Respondents argue that the "sole exception to the strict application of jurisdictional time limits is the unique and isolated case in which a court mistakenly says to a party 'don't worry. Your appeal has been perfected.'" Opp. 17.

filed "in ample time" even though the court's statement was erroneous. *Thompson*, 375 U.S. at 386. The Court stated: "petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal[,] . . . the District Court concluded that the act had been properly done[, and] . . . the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.* at 387.

Similarly, in *Wolfsohn v. Hankin*, 376 U.S. 203, the Court held that the time to appeal was tolled by a district court order extending the time for plaintiff to file a motion for rehearing under Fed. R. Civ. P. 59, even though the district court did not have power to extend the time for filing such a motion. The plaintiff relied on that order in waiting until after the disposition of the motion to appeal. *See Wolfsohn*, 376 U.S. 203, *rev'g*, 321 F.2d 393 (D.C. Cir. 1963).[6]

The Ninth Circuit's holding here constitutes a straightforward application of *Thompson* and *Wolfsohn*. As the court found, petitioner filed an application for an extension of time to file a Rule 59(e) motion and the district court granted that application well within the time to file a notice of appeal. Petitioner relied on the district court's order in not filing her notice of appeal until after the resolution of the Rule 59(e) motion. If the court had denied that application, petitioner would have had ample time in which to file a notice of appeal or to file a motion to extend the appellate filing deadline. Under *Thompson* and *Wolfsohn*, she cannot be faulted or penalized for relying on the district court's order in waiting until after the disposition of her Rule 59 motion to file an appeal. (App. A-4.) *See also Fairley v. Jones*, 824 F.2d 440, 442 (5th Cir. 1987) ("Under *Wolfsohn* the reliance of a pro se litigant, like Fairley, on the magistrate's extension of time constitutes unique circumstances justifying our exercise of jurisdiction"); *Stauber v. Kieser*, 810 F.2d 1 (10th Cir. 1987) ("by

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[6] Indeed, the facts here are more compelling than those in *Wolfsohn*. While the plaintiff in *Wolfsohn* was represented by counsel who could have been expected to question the district court's order, petitioner here was *pro se*. *See Fairley*, 824 F.2d at 443.

granting an extension and then accepting the Rule 59(e) motion, the district court led plaintiffs to believe that those actions were properly done"); *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612, 617 (11th Cir. 1986) ("As in *Wolfsohn*, appellant here reasonably relied on an erroneous district court order granting an extension of time to file a new trial motion"); *Inglese v. Warden, U.S. Penitentiary*, 687 F.2d 362, 363 (11th Cir. 1982) (same).[7]

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[7] We recognize that the Circuit courts are split on the question of the scope of *Osterneck* and that some Circuits would not toll the time for appeal when an attorney relies on an extension of time to file a Rule 59(e) motion. *Compare Fairley*, 824 F.2d at 442 (appellant reasonably relied on district court order extending time to move under Rule 59(e)); *Inglese*, 687 F.2d at 363 (same); *Butler*, 804 F.2d at 617 (same); *Stauber*, 810 F.2d at 1 (same); *Aviation Enters., Inc. v. Orr*, 716 F.2d 1403, 1406 n.25 (D.C. Cir. 1983) ("Courts long have permitted parties to maintain otherwise untimely appeals in 'unique circumstances'—those in which the appellant reasonably and in good faith relies upon judicial action seemingly extending the appeal period, provided that the court's action occurs prior to expiration of the official period and that the appellant files a notice of appeal before expiration of the period apparently judicially extended"); *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.3 (D.C. Cir. 1986) (Ginsburg, J. dissenting) (discussing "unique circumstances" doctrine); and *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 986 (5th Cir. 1992) (reliance on clerk's notice that order was entered presents "unique circumstances") *with Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991) ("Even if we assume Feinstein learned on November 15th that this motion was granted and, based on that order, opted to forgo filing his notice of appeal at the last minute, application of the unique circumstances doctrine would still be unwarranted"); *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, 1533-34 (11th Cir.), *cert. denied*, 112 S. Ct. 438 (1991) (unique circumstances doctrine not applicable where attorney "inadvertently overlooked" prohibition against extending time for Rule 59(e) motions); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365 (3d Cir. 1990) (unique circumstances doctrine not applicable where failure to timely file was result of the "party's own misreading of the applicable law" and party's conduct was unreasonable in its totality); and *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989) ("mere entry of a minute order [by a magistrate] . . . is not an act of affirmative representation by a judicial officer as contemplated by *Osterneck*"). Even if those cases could be applied to the reliance of a *pro se* plaintiff, at most the argument that respondents advance would constitute a reason to grant certiorari and not a reason to deny the writ, as respondents themselves suggest. Opp. 18.

The error in respondents' argument lies in its equation of the specific assurance required by *Osterneck* and *Thompson* with "'specific assurance' by a judicial officer that an appeal has been perfected". Opp. 16. As respondents acknowledge, the Court in *Osterneck* held only that the *Thompson* doctrine applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done", *Osterneck*, 489 U.S. at 179—a formulation almost identical to that in *Thompson*. That standard was not satisfied in *Osterneck* because the petitioners there had received no specific assurance that the act was properly done—they relied on an implication that could be drawn from the district court's actions.[8] In this case, however, the district court specifically assured the *pro se* petitioner that her Rule 59(e) motion was timely and accepted that motion within the time for moving to extend the appellate filing deadline. Petitioner's reliance on that specific assurance in not filing her notice of appeal until after resolution of the Rule 59(e) motion thus tolls the time for appeal. The Ninth

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[8] In *Osterneck*, the Court of Appeals described the Osternecks' reliance argument as follows:

> "The Osternecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the execution of the January 30 judgment. In addition, the clerk of the district court required the Osternecks to pay an additional filing fee for their notice of cross-appeal filed after the district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed. R. App. P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable."

Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989).

Circuit's jurisdictional holding does not provide grounds to deny review of a decision that conflicts with that of numerous other Circuits and that would deprive all discrimination victims of the right to sue those persons who have discriminated against them.

CONCLUSION

For the foregoing reasons and the reasons stated in petitioner's opening brief, the petition for a writ of certiorari should be granted.

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